

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 437 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?  
Nos. 1 & 3 to 5 No. No.2 Yes.

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BANSRAJ RAMESH CHOBE

Versus

TARABEN

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Appearance:

MS RUPAL PATEL FOR MS.VASUBEN P SHAH for Appellants.

MR SC SHAH FOR MR SN SHELAT for Respondent No. 1, 2

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CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 23/04/98

ORAL JUDGEMENT

This is defendants Second Appeal.

The short controversy was that the plaintiffs-respondents filed a suit against the defendants-appellants for possession of room no. 4 with the allegation that the said room was trespassed by the appellants on 11.3.1977. It was the case of the

respondents that this room was initially in tenancy of Motibhai and after he vacated the same it was locked. Finding an opportunity the appellants opened the lock and committed trespass and since then they occupied the room as trespasser. Mesne profits was also claimed in addition to decree for possession.

The suit was resisted by the appellants on the ground that they are tenants of room no.4 on monthly rent of Rs.25/- and that since the respondents attempted to enhance the rent there was also dispute regarding standard rent that complaint was sent to the police authorities and false suit was filed.

Both the Courts below under concurrent finding found that the appellants failed to establish their tenancy in the disputed room and that the respondents succeeded in establishing that the appellants trespassed in room no.4. Accordingly, the Trial Court decreed the suit for possession and simultaneously granted decree for mesne profits against the appellants @ Rs.25/- p.m. The Appellate Court however modified the decree for mesne profits and enhanced the same @ Rs.30/- p.m. It is therefore, this Second Appeal against the concurrent findings of the two Courts below.

Following substantial questions of law were formulated in this appeal :

- (A) In the and circumstances of this case, whether the lower appellate Court has materially erred in exhibiting and relying upon the documents which were not proved by the plaintiff ?
- (B) In the fact and circumstances of this case, whether the lower appellate Court has erred in not holding that the relationship between the parties was that of tenant and landlord ?
- (C) In the facts and circumstances of this case, in the absence of any Cross-Objections filed by the plaintiffs, whether the lower appellate Court has erred in modifying the decree of mesne profits passed by the trial Court ?
- (D) In the facts and circumstances of this case, whether the lower appellate Court has erred in

not holding that in the absence of any evidence produced by the plaintiff the rent of the adjoining premises would be the only criteria for fixing the mesne profits ?

I have heard learned Counsel for the parties and examined two judgments on record. So far as third question is concerned, the First Appeal was filed by the present appellants. They were defendants in the Trial Court. No cross appeal or cross objection was filed by the present respondents in the lower Appellate Court claiming enhancement of quantum of mesne profits. Still the lower Appellate Court entered into futile exercise enhancing mesne profits from Rs. 25/- to Rs.30/- p.m. Amount may be insignificant but the exercise of the lower Appellate Court was futile and illegal. In the absence of cross objection or cross appeal no additional direction could be given by the lower Appellate Court in favour of the present respondents who remained silent in the lower Appellate Court in challenging the decree for mesne profits. Consequently it is held that the lower Appellate Court erred in enhancing mesne profits without any cross objection or cross appeal from the side of the respondents. The second question is answered accordingly. As consequence thereof fourth question is also answered in the manner that the lower Appellate Court erred in enhancing the rate of mesne profits.

Substantial questions no. 1 and 2 being inter connected can be taken up together. Only short controversy is whether the defendants appellants trespassed in room no.4 as alleged by the plaintiffs-respondents or that they are tenants in room no.4. On this short controversy there is concurrent finding of the two Courts below on appraisal of evidence on record and upon taking into consideration the circumstances appearing from the evidence on record. Normally such concurrent findings cannot be interfered in Second Appeal unless it is shown that the findings are perverse and no reasonable man from the evidence on record and circumstances of the case could have come to such conclusion. After examining the two judgments on record it can be said that unnecessary discussion in the judgment of the lower Appellate Court could have been avoided but it can hardly be said that the judgments of the two Courts below are perverse. In these circumstances the High Court in Second Appeal will not reassess the evidence and substitute its own findings.

Still for the sake of proper administration of justice the evidence on record has been considered so

also the circumstances of the case by this Court. Initial burden lay upon the respondents to establish that the appellants committed trespass in room no.4. In order to discharge this onus there is oral evidence from the side of the respondents coupled with some documentary evidence in the nature of notice sent under postal certificate and by registered post. There is also typed copy of complaint of trespass made to the police authorities. This typed copy is certainly inadmissible in evidence. The contention of the learned Counsel for the appellants on this point has therefore to be accepted. The original complaint was not summoned from the office of Superintendent of Police nor certified copy of the complaint was filed. Only receipt was filed showing that some complaint was given to police authorities. If carbon copy of the said complaint would have been filed and would have been proved it could be read in evidence. As such typed copy of complaint to the police authorities being inadmissible in evidence was wrongly read in evidence by the lower Appellate Court. However, even on ignoring this documentary evidence the judgment of the lower Appellate Court cannot be reversed. Oral evidence from the side of the plaintiffs is admissible. When trespass was committed in absence of the plaintiffs only oral evidence could be adduced and there could be no direct oral evidence or documentary evidence of trespass. Only circumstances may be considered for corroboration of plaintiffs. It is well settled rule that witness may come and tell lies but not the circumstances. Learned Counsel for the appellants pointed out certain minor contradictions in the oral evidence of the plaintiffs respondents but on minor contradictions which do not go to the root of the credibility of the witnesses it is no ground for disbelieving witnesses examined by the plaintiffs.

The first circumstance in favour of the respondent is sending notice by postal certificate complaining the trespass committed by the defendants-appellants. Learned Counsel for the appellants contended that postal certificate is inadmissible in evidence and since it was not proved in accordance with law it could not be read in evidence. I am afraid if this contention can be accepted. Receipt issued by the postal authorities in the nature of postal certificate is public document and it can be read in evidence without formal proof. The fact therefore remained that notice was sent under postal certificate to the defendants. There is oral evidence that the said notice was sent at correct address of the defendants. Presumption can then be drawn that such letter or notice

was received by addressee. It is not the case where the letter was returned to the sender. Bare denial of the addressee is not enough to rebut such presumption. If notice was received by the defendants but they remained silent and did not reply at the earliest that they were tenants, this is a circumstance against them and in favour of the respondents.

Another notice was sent by registered post at the correct address of the appellants which was refused. Presumption which can be drawn is that the notice which was sent at correct address was refused by the appellants. Beyond this no presumption can be drawn that the appellants knew the contents of the registered notice. So this is one circumstance viz. non reply of the notice by the appellants which goes against them and in favour of the respondents.

The defendants-appellants have come out with the case of tenancy. They could demolish the case of the respondents by proving their tenancy. There are two rooms No. 3 and 4. It is the case of the appellants that room no.3 was also in the tenancy of appellant no.1 So far as room no.4 is concerned there is no evidence from the side of the appellants to establish tenancy. No rent receipt has been filed. No rent note was filed. No attempt was made at any time to tender rent to the respondents by Money Order. The grievance is that rent was paid but receipt was not issued by the landlord-respondents. If this was so, notice could have been issued to the respondents for issuing rent receipt. This was also not done. At no point of time rent was deposited in any Court of Law. If really there was dispute regarding enhancement of rent or regarding standard rent application should have been moved before the competent court for fixation of standard rent. That was also not done. As such alleged dispute regarding standard rent or enhancement of rent is also imaginary. No witness was examined, in whose presence the tenancy was settled between the parties. Reliance was placed upon extract of diary produced by the respondent Exh.31. It was argued that this document bears complete account of rent paid by the appellants to the respondents. Learned Counsel for the respondents on the other hand contended that this document does not relate to room no.4 but it relate to room no.3. There is no specific mention in this document whether it relates to room nos. 3 or 4. Consequently it cannot be considered to be conclusive evidence of amount of rent paid by the appellants to the respondents in respect of room no.4. This document is therefore unable to demolish the case of the respondents

or establish the case of the appellants. In view of the aforesaid discussions it can be said that no error was committed by the two Courts below in recording finding that the appellants committed trespass over room no.4. As such decree for possession in respect of room no.4 was rightly passed by the two Courts below. The first two substantial questions are answered accordingly.

Appeal thus succeeds in part only. The appeal is therefore partly allowed. Judgment and Decree of the lower Appellate Court is modified. Decree for possession by the two Courts below is confirmed. Decree for mesne profits @ 25/- p.m. passed by the Trial Court is maintained and that @ 30/- p.m. passed by the lower Appellate Court is set aside. In the circumstances of the case parties shall bear their own costs.

Sd/-

(D.C.Srivastava, J)

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m.m.bhatt